



The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

Editor-in-Chief, Luis Martinez-Monfort, Esq., Mills Paskert Divers P.A.

Articles Editors, Adam Alpert, Esq., Bush Ross, P.A.

SPRING, 2005

PRESIDENT'S MESSAGE



by Edwin G. Rice, Esq.
Glenn, Rasmussen, Fogarty & Hooker, P.A.

As we all know, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was recently enacted into law. Although most of the changes to the bankruptcy laws enacted by this statute take effect 180 days after it was signed into law, some of its provisions become effective at other times.

Undoubtedly, the new legislation is the most extensive re-write of the bankruptcy laws since the enactment of the Bankruptcy Code. Although we may not yet fully appreciate the many ways the new law will change our bankruptcy practice, one thing is certain — bankruptcy practitioners have a lot of new things to learn.

To that end, the Tampa Bay Bankruptcy Bar Association is committed to helping our members with this educational process. Over the next several months, the Association will devote substantial effort to providing our membership with continuing legal education opportunities regarding the new law. We will be putting on or coordinating seminars describing the new law and advising our membership of other CLE programs that become available.

Already, Randy Hiepe (who heads our Consumer Section) organized a brown bag luncheon program at which Judge

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CLERK'S CORNER

by Chuck Kilcoyne
Deputy-in Charge

On April 1, 2005, Ms. Rosalie ("Rosie") Gratz retired from her position as Financial Administrator of the United States Bankruptcy Court for the Middle District of Florida. Rosie served the Court for a period of 38 years.

The Clerk's office held a retirement breakfast for Rosie on March 31, 2005, attended by many members of the Bar Association, trustees, representatives from other federal agencies, her husband and son. Chief Judge Glenn and Judge Paskay started the day in Courtroom 8A by presenting Rosie with a plaque designating March 31, 2005 as "Rosie Gratz" day. Later at the breakfast, Judge Paskay addressed the gathering and recalled that day, some many years ago, that he had hired Rosie. He remarked that she had performed a very important role in the Clerk's office with distinction each and every year for the past 38 years.

The Clerk's office will definitely miss her.

Susan Magaditsch has assumed the duties of Financial Administrator.

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Saxon, Gilmore, et al.
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Fax: (813) 314-4555
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Fax: (813) 259-9895
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Shirley C. Arcuri, P.A.
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Fax: (813) 286-4168
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Bush, Ross, et al. P.A.
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Fax (813) 223-9620
cbaris@bushross.com

Caryl E. Delano
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Fax: (813) 228-6000
Email: delano@mcaddison.com

Luis Martinez-Monfort
Mills Paskert Divers, P.A.
(813) 229-3500
Fax (813) 229-3502
Immonfort@mpdlegal.com

Kelley Petry
Kelley M. Petry, P.A.
(813) 239-0713
Fax: (813) 239-0715
kmpetry@aol.com

Alberto Gomez
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Fax: (813) 301-1001
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CASE LAW UPDATE

To Avoid, Or Not to Avoid, That Is the Question¹

by Larry Foyle, Esq., Kass Shuler Law Firm

Recently, the Honorable Michael Williamson was asked to decide an interesting avoidance question in Grubbs v Florida Department of Revenue, (In re Grubbs) 2005 Bankr. Lexus 274 (Bankr.M.D. Fla. 2005). The case involved an attempt by the Debtor to avoid an alleged pre petition fraudulent transfer. Debtor paid a tax liability which was actually owed by one of its affiliates to the State of Florida and alleged that Debtor had not received reasonably equivalent value for the transfer. Since the State of Florida had filed a claim in the case, the issue of Sovereign immunity did not appear to be implicated, unless the Court were to determine that section 106 of the bankruptcy code was unconstitutional. The Debtor contended that the Sovereign had waived its immunity and could therefore be subject to suit.

For well over a decade, the battles in cases against the Sovereign have focused upon whether section 106 of the bankruptcy code is constitutional² and if so, whether one or more post bankruptcy acts taken by the Sovereign waives its immunity. Examples such as whether the Sovereign filed a claim or took other steps within the bankruptcy case that demonstrated such waiver are well documented in the case law. Many of the cases have resulted in very narrow decisions of limited application to the average bankruptcy lawyer. For example, during the 2004 term, the Supreme Court of the United States in the Hood³ case could have resolved many of the sovereign immunity debates, could have decided the constitutionality question, but chose to completely duck the issue and resolved its decision on grounds that were never raised on appeal by either party.⁴ Other courts have found Section 106 unconstitutional in its application.⁵

The Grubbs decision approaches and resolves the question in a different way.⁶ The result is well-reasoned, but perhaps not the result one would expect. In essence, the Court in Grubbs found that the bankruptcy code's provision relating to sovereign immunity was constitutional and that the State's immunity was waived by post-petition events. That result, however, was rendered moot because the Court found that the Debtor lacked standing to sue the State.⁷ Under bankruptcy code section 544, standing has to be determined by analyzing a party's rights and powers as they exist on the date of the bankruptcy petition. In looking at the limitations imposed upon a Trustee's avoiding powers, the Court found that the section 544 powers were derivative and not original in nature. In order for the Trustee to have standing to exercise the avoiding powers, the Court was required to find an existing pre-bankruptcy creditor who possessed such avoiding power that a trustee could borrow. The Court determined that there was not an actual creditor who could have acted with such power as of the bankruptcy filing. Therefore, the Debtor was powerless and lacked standing to file an avoidance action against the State.

Even though bankruptcy code section 106 was determined constitutional and even though the Sovereign waived its sovereign immunity by post bankruptcy conduct, the Debtor could not sue and avoid the transfer. In reaching its result, the Court looked to the statute which provides in part:

Except as provided in paragraph (2), the **trustee may avoid any transfer** of an interest of the debtor in property or any obligation incurred by the debtor that is **voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title**⁸ or that is not allowable only



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ctcorcoran@mindspring.com

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ECHOS OF WISDOM

By The Cramdown Editorial Board

Even though he no longer presides over Courtroom 8B, echoes of Judge Thomas E. Baynes advice to all who appeared before him over the years still haunts the halls of the courthouse (and the minds of some local practitioners). Here are the Cramdown's favorite Bayneisms:

"This case is sliding down the razor blade of life."

"Don't change horses in midstream."

"I will call the balls and strikes."

"Spin the wheel of justice."

"The nature of the game is"

"Hoisted on your own petard"

"Not in the pejorative sense"

"I am an old navy man myself."

"Greatest thing since sliced bread"

"Discovery is open gentlemen . . . protect your own discovery."

CLERK'S CORNER

Continued from page 1

As of March 21, 2005, all new chapter 7 and 13 cases filed in the Tampa Division will be randomly assigned to either Chief Judge Glenn, Judge Williamson, Judge May or the successor to Judge Baynes. Those cases assigned to the successor judge will be noted in the case number with the initials "TBA." The case management staff on the former Judge Baynes team will administer those cases assigned to "TBA" and Judge May will enter all orders and handle all hearings associated with those cases.

Please pay attention to the hearing notices and all cases still assigned to former Judge Baynes ("TEB" in the case number) – the body of the notice will direct you one of the other judges in the Tampa Division who is actually hearing that matter.

Please visit our website at www.flmb.uscourts.gov to review Administrative Order Establishing Deadline for Attorneys in the Tampa and Ft. Myers Divisions to Participate in the Electronic Case Filing System, Administrative Order TPA-2005-5 and Administrative Order FTM-2005-2. See Pages 7 and 8 of this Newsletter for a complete copy of the Administrative Order.



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IMPORTANT NOTICE EFFECTIVE MAY 1, 2005

UNITED STATES BANKRUPTCY COURT MIDDLE DISTRICT OF FLORIDA TAMPA AND FT. MYERS DIVISIONS

In re:

Administrative Order TPA-2005-5
Administrative Order FTM-2005-2

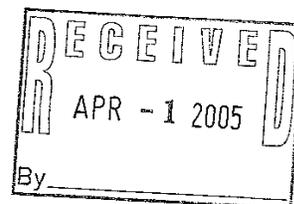
DEADLINE FOR ATTORNEYS
TO PARTICIPATE IN
ELECTRONIC CASE FILING

ADMINISTRATIVE ORDER ESTABLISHING DEADLINE FOR ATTORNEYS IN THE TAMPA AND FT. MYERS DIVISIONS TO PARTICIPATE IN THE ELECTRONIC CASE FILING SYSTEM

In 2003, the United States Bankruptcy Court for the Middle District of Florida began implementation of the Case Management/Electronic Case Filing System that is required of all United States Courts. In June, 2003, attorneys began to file pleadings using the Electronic Case Filing (ECF) system. However, many attorneys failed to voluntarily make the essential conversion. To promote greater efficiency in the administration of bankruptcy cases, the Court must require all attorneys to participate in the ECF system. In September, 2004, the Orlando Division required attorneys to participate, and the transition has been very successful. In October, 2004, the Jacksonville Division required attorneys to participate, and the transition there has been very successful. Accordingly, in December, 2004, the Tampa and Ft. Myers Divisions announced that attorneys would be required to participate beginning May 1, 2005. Therefore, it is

ORDERED:

1. Effective May 1, 2005, all attorneys, trustees, or examiners who file documents in the Tampa Division and in the Ft. Myers Division of this Court, whether on behalf of a debtor, a trustee, a creditor, or some other interested party, must file all documents and pleadings electronically using the ECF system.



2. Exceptions to the mandatory use of the ECF system include:

A. Documents under seal;

B. Unanticipated inability to use the ECF system due to an internet failure by the filer.

(Filers experiencing such a failure shall submit the pleading or document on diskette or CD in a PDF format with an "Affidavit and Request to File" attached. The clerk then will electronically file the pleading or document.);

C. Unanticipated inability to use the ECF system due to an internet failure by the Court.

(If the ECF system is not accessible due to the Court's failure, the filer shall print the notification that the ECF system is not accessible and submit it with the pleading or document to be filed either on diskette or CD in PDF format.);

D. Trial or evidentiary hearing exhibits are to be filed on paper unless otherwise ordered in a particular case; and

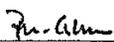
E. Chapter 11 ballots.

F. Pleadings or documents submitted by parties without legal representation;

3. After May 1, 2005, the Court may order attorneys filing pleadings or documents via paper to show cause why they cannot use the ECF system. Further, the Court may order pleadings and documents be stricken if they are not filed using the ECF system.

DATED at Tampa, Florida, this 31st day of March, 2005.

BY THE COURT



PAUL M. GLENN
Chief Bankruptcy Judge

CASE LAW UPDATE II

Debtor Entitled to Emotional Distress Damages for Violation of Automatic Stay

by Dennis LeVine, Esq.
Dennis LeVine & Associates, P.A.

When a creditor violates the automatic stay following the filing of a bankruptcy petition, the debtor has the right to recover actual damages for willful violation of the automatic stay. One issue being discussed in recent cases is whether actual damages may include damages for emotional distress under 11 U.S.C. §362(h).

In a recent case, Dawson v. Washington Mutual Bank, F.A., 367 F.3d 1174 (9th Cir.), *withdrawn*, 385 F.2d 1194 (9th Cir. 2004), the Ninth Circuit answered the question no. Upon reconsideration, however, the Ninth Circuit changed its mind and now answers yes. In the latest decision, the Court stated: “[i]n so holding, we join an emerging consensus recognizing the availability of damages for emotional distress that results specifically from a willful violation of the automated stay.”

The Ninth Circuit in Dawson stated that not every willful violation merits compensation for emotional distress. The Court wanted to limit frivolous claims. The Court held that to be entitled to damages for emotional distress under §362(h) an individual must (1) suffer significant harm, (2) clearly establish the significant harm, and (3) demonstrate a causal connection between that significant harm and the violation of the automatic stay (as distinct, for instance, from the anxiety and pressures inherent in the bankruptcy process). The Court noted that fleeting or trivial anxiety or distress does not suffice to support an award; instead, an individual must suffer significant emotional harm.

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**THE TAMPA BAY BANKRUPTCY BAR ASSOCIATION
2004-2005
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The Association is looking for volunteers to assist us this coming 2004-2005 year. If you are interested in getting more involved with the Association or one of the Standing Committees, please contact any one of the Association officers or the Chairpersons listed below.

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President's Message

Continued from page 1

Williamson gave a presentation regarding the changes to section 707(b) of the Bankruptcy Code. The luncheon program was provided free of charge to our members, including free food and drink. Randy has pledged to help coordinate several more of these brown bag luncheon programs.

On June 3, 2005, Stetson University College of Law and the Business Law Section of The Florida Bar will be presenting a half-day seminar previewing the Bankruptcy Reform Act. Presenters at the June 3 seminar include Judges Paskay and Williamson, as well as TBBBA members Russ Blain, Roberta Colton, and Cathy McEwen.

Additionally, our Association's CLE Committee has advised that our first monthly luncheon program for the 2005-2006 year will be devoted to the Bankruptcy Reform Act and that another half-day seminar is in the works. Be sure to review your TBBBA e-mail announcements for more details on upcoming educational opportunities.

Finally, I would like to remind our membership that our annual dinner will be held at the Palma Ceia Golf & Country Club on June 8th. For more details, contact Caryl Delano at 223-2000.

To Avoid, Or Not to Avoid

Continued from page 3

under section 502(e) of this title.

As of the date of the Debtor's filing for bankruptcy, the State had not yet taken any steps to waive its immunity and still enjoyed its special protections. Inasmuch as there was no existing pre-bankruptcy creditor, to whom the Debtor could point and from whom the Debtor could derive its power under section 544(b) to avoid a transfer, the Debtor, as Trustee, lacked standing to invalidate the State's receipt of the pre-bankruptcy transfer when Debtor paid its affiliate's tax liability.⁹

The questions perhaps not answered in *Grubbs* concern whether a general creditor could now sue the State claiming the benefit of the post bankruptcy sovereign immunity waiver. After the section 546(a) statute of limitations has expired, a trustee cannot bring an avoidance action under the Chapter 5 provisions. A general creditor, however, might have the power to pursue the State in a non-bankruptcy forum assuming the State has waived its immunity. Such creditor could theoretically have standing.¹⁰ The standing issue in such instance would be determined as of the time of the lawsuit, and not the date of the petition because the power to avoid would not be derived under bankruptcy code chapter 5, but would originate under state law. If the transfer was avoidable under principles of state law, such creditor could prevail. Additionally, it might be argued

that an avoidance action could be brought under section 544(a)(1) or (2) using applicable State law. An actual creditor's existence on the date of filing would not be required.¹¹ Perhaps the language permitting the Trustee to avoid any transfer of property versus any transfer of an interest in property is a distinction with no real difference. Most courts have applied the 544(b) test and ignored the possibility under 544(a).¹² Such esoteric arguments, however, will have to wait for a different day, in a different court.

¹This brief case note is not intended to deal with some of the emerging standing questions in cases such as *Cybergenics* in which it was argued that a post confirmation creditors' trust could not acquire the Trustee's standing to pursue avoidance actions because a Debtor should not be able to assign such actions to a post confirmation entity pursuant to the plan. The Third Circuit initially determined the creditors lacked standing and then upon en banc rehearing reversed and found that such rights could be assigned by the estate to a creditors trust who could litigate post confirmation.

This brief case note also does not address difficult standing issues such as raised and dealt with in the 11 Circuit's *O'Halloran* case in which the court held that a trustee who was not using avoiding powers did not have standing to assert avoidance claims against third parties because the Debtor was in *pari delicto* with the alleged transferees.

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Chapter 7 Package	399.00	399.00
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Hardware License	1,299.00	1,299.00
Training	1,299.00	1,299.00
Support	1,299.00	1,299.00
Documentation	1,299.00	1,299.00
Installation	1,299.00	1,299.00
Upgrade	1,299.00	1,299.00
Backup	1,299.00	1,299.00
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Security	1,299.00	1,299.00
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FIFTH INTERNATIONAL BANKRUPTCY SYMPOSIUM

by Roger Buchanan Curlini, III, Esq.
Program Attorney, Office for CLE,
Stetson University College of Law

Guten Tag!



(Christoph Paulus), Insolvency expert Dr. Eberhard Braun, Justice Hans-Peter Kirchhof, and several other fantastic speakers. Dr. Michael Krenzler, President of the Freiburg Bar, is serving as the dignitary keynoter at the Welcoming Reception.

The current travel group exceeds fifty and the forecast is for the Freiburg trip to be Stetson's largest International Bankruptcy Symposium yet. The host location is The Hotel Rheingold and Stetson is serving as the reservation intermediary for making room arrangements.

If you are interested in more information please call Stetson's office at 813-228-0226, visit www.law.stetson.edu/cle or e-mail cle@law.stetson.edu

Auf Wiedersehen 🇩🇪

Stetson University College of Law is proudly hosting its Fifth International Bankruptcy Symposium this Summer (June 12-15th, 2005) in Freiburg, Germany. Past destinations have included Varenna, Italy; Budapest, Hungary; and Montreal Canada. Freiburg is an old-world university-city in the middle of the scenic Black Forest region of Southern Germany. It is close to Switzerland, France, and the beautiful Lake Constance - and is easily accessible by train from Frankfurt. The Symposium consists of morning sessions over a three day period, in which a mixture of twelve faculty from the United States and abroad speak about Insolvency and Bankruptcy Issues in an International setting.

The morning learning sessions are followed by group tours. This year's tours include trips to the Black Forest by guided bus tour including Glottertal, St. Peter, St. Margen, Hinterzarten, Titisee (spa town on banks of glacial lake), and Hollental; A guided bus tour into Strasbourg, France where the group will tour the city, visit the European Parliament, then enjoy a pleasant dinner before returning to Freiburg; and a trip to the Wine-Country where attendees and their guests will tour and taste the local wines on the guided tour which includes Botzingen, Vogelsan Pass, Oberbergen, and Burkheim (site of a ruined castle).

The driving force behind the conference is the program chair, the Honorable Alexander L. Paskay, Chief Judge Emeritus of the U.S. Bankruptcy Court for the Middle District of Florida and Stetson Adjunct Professor. Judge Paskay has once again assembled an unbelievable faculty group for the Symposium including: Hans Beyer, Russell Blain, Roberta Colton, David Heller, Soneet Kapila, and Patricia Redmond. German speakers include the top German Bankruptcy Professor

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FEBRUARY TBBBA MONTHLY CLE LUNCHEON

Judge Baynes: The Man, the Legacy

The February TBBBA lunch meeting was particularly special to the members of our Bar - it was held in honor of Judge Thomas Baynes. Jeff Warren moderated the program, which included discussions concerning several significant cases Judge Baynes presided over during his career. Harley Riedel and Roberta Colton served on a panel discussing these cases.

Prior to the panel discussion, Chief Judge Glenn presented Judge Baynes with several gifts. The gifts included a "john boat" from the TBBBA, a boat trailer from the Judges, and a remarkably lifelike "fish"



cake. Jeff Warren presented Judge Baynes with a special gift from the TBBBA – the famous emergency "Red Phone".

The luncheon was the most well attended program this year and one of the best attended in recent memory. Some of the distinguished guests including Judge Baynes' wife Maija, Bankruptcy Judges Glenn, Paskay, Williamson, May, Funk, Briskman, and Jenneman, and several of Judge Baynes' former and present staff. The CLE committee would like to thank all those who helped with the program, and in particular co-chairs Lynn Sherman and Greg McCoskey. 



MARCH TBBBA MONTHLY CLE LUNCHEON
For the Record: Evidentiary Hearing and
Appeallate Considerations for Winning a Case



Speaker:
The Honorable Charles E. Wilson



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CALENDAR OF EVENTS

<u>Event</u>	<u>Date</u>	<u>Location</u>
Seminar on Bankruptcy Abuse Prevention and Consumer Protection Act of 2005	June 3, 2005 12:00 p.m. - 4:30 p.m.	Stetson Tampa Law Center
TBBBA Annual Dinner	June 8, 2005	Pamla Ceia Golf & Country Club
Florida Bar Annual Meeting Federal Court Practice Committee Round Table	June 23, 2005 2:30 p.m. - 5:30 p.m.	Orlando World Marriott

To Avoid, Or Not to Avoid

Continued from page 9

²74 Am. Bankr. L.J. 1 ARTICLE: A Bankruptcy Exception to Eleventh Amendment Immunity: Limiting the Seminole Tribe Doctrine. By Leonard Gershon. “[I]n Seminole Tribe of Florida v. Florida, the Supreme Court interpreted the Eleventh Amendment as denying Congress the power to abrogate the sovereign immunity of a state pursuant to the Indian Commerce Clause. In dicta, the Court extended this limitation to all of Congress’s Article I powers, creating a legal tenet that may be described as the “Seminole Tribe doctrine.” Under this doctrine, Congress has the power to authorize private suits against a state only under the Fourteenth Amendment. (footnotes omitted). But see footnote 4 infra.

³Tennessee. Student Assistance Corp. v. Hood, 541 U.S. 440 (U.S., 2004) A bankruptcy court’s in rem jurisdiction permits it to determine all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is one against the world. Because the court’s jurisdiction is premised on the res, however, a nonparticipating creditor cannot be subjected to personal liability.

⁴ The court in Hood determined that the discharge of a debt was an in rem remedy and did not implicate sovereign immunity because no actual claim was being brought against the State.

⁵ See e.g. United States v. Nebraska Dept. of Revenue (In re Doiel), 228 B.R. 439, 440 (D.S.D., 1998) “This is an appeal from Bankruptcy Court in which this Court must consider the constitutionality of 11 U.S.C. § 106(a), a provision that purportedly abrogates the

immunity of the States in certain situations arising in the bankruptcy process. For the following reasons, the Court concludes that 11 U.S.C. § 106(a) was not passed pursuant to a valid exercise of Congress’ constitutional power, and therefore, the provision is unconstitutional.”

⁶While the decision is innovative or perhaps new, it is based upon a reading of section 544 and prior cases that suggest that the creditor from whom the Trustee derives chapter 5 powers must actually exist and cannot be a hypothetical creditor.

⁷Under the code, section 544 is intended to transfer the power to avoid from the creditors to the Trustee during the period of the applicable statute of limitations under section 546(a). Clearly the power is derivative and not original with the Trustee. At the end of the avoidance period under bankruptcy law, a general unsecured creditor might be able to still bring the action under applicable state law (to the extent the state law statute of limitations had not yet expired). See footnote 8 below.

⁸ 11 U.S.C. §544 (b)(1) (emphasis added). The distinction, important to the Court is that section 544(b) requires an actual creditor, whereas section 544(a) does not. Cf. 544(a)

(a)The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of

Continued on page 16

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ABI UPDATE

Compiled from American Bankruptcy Institute Update

Most Provisions of New Legislation Effective 180 Days from April 20, 2005, but there are Important Exceptions.

President Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (S. 256) into law on April 20, 2005. The new law will make for some significant changes in consumer and business bankruptcy practice. The new law is generally effective 180 days from April 20th, applicable only to cases filed on or after the effective date. However, there are some important departures from this default rule, including some provisions that are effective April 20th and even retroactively. For example,

-Sections 308 (reduction of the exemption for fraud), 322 (limiting the exemption) and 330 of the bill, relating to the homestead exemption, are effective to cases filed April 20th and after.

-Section 324, relating to the courts' exclusive jurisdiction over matters concerning professional employment, applies to cases filed after today.

-Section 325, changing the filing fee structure, is effective for the two-year period beginning today (subsections (b) and (c) regarding the U.S. Trustee system fund and the allocation of fees collected by courts).

-Section 1213, amending Section 547 of the Code, overruling the DePrizio rule on insider preferences, applies to any case now pending or commenced on or after April 20th, and is thus retroactive.

-Section 1223, providing for the authorization of new bankruptcy judges, is effective April 20th.

-Section 1234, amending Section 303 of the Code regarding involuntary cases, is effective April 20th and applies to cases commenced before, on or after April 20th and is thus retroactive.

Continued on page 23



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To Avoid, Or Not to Avoid

Continued from page 14

the debtor or any obligation incurred by the debtor that is voidable by--

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, **whether or not such a creditor exists**;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, **whether or not such a creditor exists**; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, **whether or not such a purchaser exists**.

⁹If in fact the Court's analysis withstands the scrutiny of subsequent scholarship, one might wonder whether there would be any reason to have section 106 in the bankruptcy code. If one only focuses upon instances in which a Trustee borrows a creditor's status, such would be the case. Section 106 is purely irrelevant and will not help the Trustee. However, if the claim arose for another reason in which the Debtor/Trustee had a direct action such as a slip and fall case, section 106 of the bankruptcy code and states subsequent post petition acts would be very relevant to determine a waiver.

¹⁰Klingman v. Levinson, 158 B.R. 109, 113 (D. Ill., 1993). See for example, the quoted material below from the Klingman case. "This holding should not be construed as suggesting that creditors may vie with the bankruptcy trustee for the right to pursue fraudulent conveyance actions. To the contrary, the commencement of bankruptcy gives the trustee the right to pursue fraudulently conveyed assets to the exclusion of all creditors. 11 U.S.C. § 546(a). **However, the trustee does not retain this exclusive right in perpetuity. The trustee's exclusive right to maintain a fraudulent conveyance cause of action expires and creditors may step in (or resume actions) when the trustee no longer has a viable cause of action.** Kathy B. Enterprises, Inc. v. United States, 779 F.2d 1413, 1415 (9th Cir. 1986) (IRS entitled to pursue collection action after bankruptcy closed); Federal Deposit Insurance Corp., 733 F.2d 1083, 1085 (4th Cir. 1984) ("**once a bankruptcy case has been closed, creditors having unavowed liens on fraudulently conveyed property can pursue their state law remedies independently of the trustee in bankruptcy**"); Dixon v. Bennett, 72 Md. App. 620, 531 A.2d 1318, 1323-25 (1987) [****10**] ("**once a trustee's statutory time period has expired, an unsecured creditor can bring an action against a fraudulent transferee under state law provided the state statute of limitations has not yet expired**"), cert. denied, 311 Md. 557, 536 A.2d 664 (1988)." (emphasis added)

¹¹ Compare for example the language of 544(b) which permits a real creditor to confer standing upon a Trustee to avoid a **transfer of the Debtor's interest in property** with 544(a)(1) and (a)(2) which permits the hypothetical judgment lien creditor to confer standing upon a Trustee to **avoid a transfer of property of** the Debtor.

¹²See e.g. Weathersbee v. Dekle, 107 Fla. 517, 1933 Fla. LEXIS 2366 (Fla. 1933)

A defrauded creditor may levy on and sell under execution property which has already been fraudulently conveyed, or (2) may bring a suit in equity to remove an alleged fraudulent conveyance as an obstruction to the full enforcement of his judgment lien, or (3) that he may bring a creditor's bill to reach conveyances which ought to be adjudged fraudulent as to his judgment.

If a judgment lien holder or a creditor with an execution returned unsatisfied can pursue a fraudulent conveyance claim under state law, then perhaps a **Trustee with borrowed status of a hypothetical creditor** could also pursue an avoidance action **using section 544(a)(1) or (2) and not resort to section 544(b)**. 



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by *Andrew T. Jenkins*
Bush Ross, P.A.



Chief Judge Paul M. Glenn was among the 34 bankruptcy and insolvency professionals from around the world inducted into as a Fellow into the **American College of Bankruptcy**. The induction ceremony was held March 18th in The Great Hall of the Supreme Court of the United States in Washington, D.C.

Scott Stichter of **Stichter Reidel Blain & Prosser, P.A.** was awarded the 2005 Jimmy Kynes Pro Bono Award by the Hillsborough County Bar Association and the Thirteenth Judicial Circuit's H.A.V.E. A Heart program for his outstanding pro bono efforts in the community.

Edmund Whitson has joined the law firm **Akerman Senterfitt** in Tampa as a shareholder. Mr. Whitson's practice concentrates in the areas of creditors' rights, bankruptcy law, commercial litigation, commercial lending and corporate transactions.

Sacha Ross has joined the law firm of **Gray Robinson** as an associate. Ms. Ross is a trial lawyer focusing her practice in the areas of creditors' rights, bankruptcy law and commercial litigation.

Wendy J. DePaul and **Jeanine Cohen** have formed **Cohen and DePaul, P.A.** The law firm concentrates in the areas of foreclosure defense, debtor's and creditor's rights, bankruptcy law and criminal defense.

Donald R. Kirk of **Fowler White Boggs Banker, P.A.** was recently certified in Business Bankruptcy Law by the American Board of Certification.

Edward S. Peterson has joined the law firm of **Stichter, Riedel, Blain & Prosser, P.A.** Mr. Peterson previously practiced law with the Bradley Arunt firm in Birmingham, Alabama, and represented both debtors and creditors in bankruptcy cases.



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THE CRAMDOWN SURFS THE 'NET

Websites for Bankruptcy Practitioners

by Catherine Peek McEwen
Catherine Peek McEwen, P.A.

The Cramdown's occasional column on useful Internet websites is back again. We welcome your suggestions for topical Internet resources that make our practice easier. In fact, our second tip below comes from eagle-eyed surfer Dennis LeVine. In this issue's column, we provide you links to official and unofficial red-lined versions of the Bankruptcy Code as it appears after the long-awaited bankruptcy reform legislation (not-too-lovingly referred to as "BARF" – as in **BA**nkrupcy **Re**Form — by bankruptcy practitioners), Dennis's useful site on calculating deadlines under BARF, a site where you can download pdf converter/printer software for *free*, a site that links to all bankruptcy courts' local rules, and a site where all states' Secretary of State websites are collected.

"BARF" amendments to the Code

BARF is reality now. Even though most of the amendments to the Bankruptcy Code will not be effective until October, you will want to study them as soon as you can so that you can ramp up with new forms and procedures to comply with the amendments. The Code as amended may not be available for some time from commercial publishers. However, red-lined versions should be readily available from various sites. The Commercial Law League of America (www.clla.org) will likely post a link to an official red-lined version. As we wrote this column, we found, via the CLLA site, a red-lined version within the House of Representatives report on S.B. 256 at www.clla.org/admin/editor/filemanager/docs/housereport-bankruptcy-s256-april2005.pdf. Well known law firm Davis Polk and Wardwell has maintained an updated version at www.dpw.com/practice/code.blackline.pdf. An extremely computer friendly version (but not printer friendly) with hyperlinks is maintained by the Weber Law Firm at www.weberlaw.com (look for Bankruptcy Reform link); this site includes amendments to other federal statutes under BARF, not just to the Code. If you "Google" for the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, you may find other sites.

"BARF" Requires Precise Countdowns

Some of BARF's provisions require some rather precise counting of an unusual number of days in order to fall outside of dragnets that are harmful to debtors. For example, one provision on homestead exemptions (which may or may not apply to Florida debtors due to its wording), limits exempt equity in a homestead to \$125,000 of new equity (i.e., not rolled over from another principle residence in the same state) if the debtor acquired the homestead within the 1,215-day

period prior to filing. Imagine a debtor's counsel's consternation if the petition is filed one day too soon; his or her face would look like Edvard Munch's "The Scream" upon learning that the debtor's exempt homestead equity is capped due to miscounting. Dennis's find helps prevent such miscues (or allows trustees and creditors to discover them!) by providing an online calculator of a countdown to a certain date, duration of days between two dates, and how many days is it to a certain date. There is much more on the site, too, such as calendars, world times, and the like. Go to the home page at www.timeanddate.com and make sure that your legal assistants bookmark the page as a "favorite."

Free pdf converter

I credit this find to InTouch Business Consultants. If you go to www.pdf995.com, you will find a link that permits you to download, for *free*, software for pdf (portable document format) printer driver and converter applications. This is all you need for converting Word, Wordperfect, or scanned documents into the pdf form required for the filing of documents using the Court's CM/ECF system, which is mandatory as of May 1, 2005. There is one little inconvenience one suffers for using this free software, but it is minor and rectified by simply closing a pop-up that appears at the time the document is converted to pdf. In case the message of this tip is not clear, we translate: There is NO NEED TO BUY EXPENSIVE Adobe® Acrobat® software in order to convert your documents to the format required for filing with the Court. Compare: \$449 vs. \$0. You choose.

Local rules of all bankruptcy courts

Never be out of compliance with local procedure when you appear *pro hac vice* or are ghost-writing for local counsel. A handy compilation of direct links to all bankruptcy courts' local rules as found on official court websites is located on the www.bankrupt.com home page. Just click on the link to Local Bankruptcy Rules.

Compilation of 50 states' SOS websites

Find corporate information and registered agents for service of process in any state with just a few clicks. Unlike some Secretary of State website collections, this jump-off page



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THE CRAMDOWN SURFS THE 'NET SAVE THE DATE

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requires no registration or fees: www.statelocalgov.net/50states-secretary-state.cfm.

Just for fun

We normally end with a fun site to help you transition to your next billable task, but these sites may actually cause you more stress! At www.lessons4living.com/stress_test.htm and www.ipn.at/ipn.asp?BHK you can take two of various available online stress tests. If you find you are in need of de-stressing, then go to www.lessons4living.com/stresscat.htm, where you will find some suggestions. After that, get up from your desk, walk down the hall and back, return, take a deep breath and hold it for ten seconds, then let it out slowly. Be careful not to fall out of your chair!

Author's note: WANTED: Someone who would like to write this column from time to time for future issues. ☞

Friday, June 3, 2005, Noon - 4:30 p.m.

Stetson University College of Law and The Florida Bar Business Law Section will co-sponsor a half-day seminar on the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. This seminar will focus on providing attorneys with an overview and preview of the new act. Be among the first to learn the highlights about the overhaul of the Bankruptcy Code and the changes it will require in our practices. Featured speakers include Hon. Alexander L. Paskay and Hon. Michael G. Williamson, among others. Date/Time: (Friday) June 3, 2005, Noon - 4:30 p.m. Place: Stetson's Tampa Law Center, 1700 N. Tampa Street. Cost: TBA (but it is anticipated to include a redlined Code and a boxed lunch). CLE credit: 5 hours, including .5 of ethics (estimated). Registration information will be provided later. Stetson's Web site (www.law.stetson.edu/cle) will soon have a brochure and registration form available to print. ☞

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TBBBA 7th Annual Golf Tournament

By The Cramdown Editorial Board

Once again, thanks to the efforts of Mike Markham and an extraordinary group of volunteers, such as Kim Johnson, Paula Luce, Cathy Kemp, Angelina Lim, Tamala Willis, Sharon Lefler, Jan Donica (photos) and Chuck Kilcoyne (putting contest), this year's 7th Annual TBBBA Golf Tournament at MacDill Air Force Base was a success. Special thanks to the tournament sponsors and congratulations to the winning foursome of Dennis Levine, Jay Harpley, Scott Stichter, and Daryl Martin. Lesson learned from this year's winning foursome – bring your own club pro instead of a client to next year's tournament!



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ABI Update

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-Section 1401, increasing the cap on the wage priority from \$4,000 to \$10,000 and doubling the look-back period from 90 to 180 days, is effective April 20th, but applies only to cases filed after April 20th.

-Section 1402, enlarging the look-back period to allow avoidance of certain transfers to or for the benefit of insiders, applies to cases filed on or after April 20th.

-Section 1403, regarding retiree benefit plans, applies to cases filed on or after April 20th.

Section 1404, which makes certain debts nondischargeable if incurred in violation of securities fraud laws, is retroactive to July 30, 2002, the effective date of the Sarbanes-Oxley Act.

Section 1405, amending Section 1104 of the Code, requiring the U.S. Trustee to move for the appointment of a trustee where there are "reasonable grounds to suspect" fraud, dishonesty or criminal conduct on the part of certain corporate insiders, is effective April 20th and applicable to cases filed after April 20th. 

Johnson Transcripts



- ◆ *Scheduling of 2004 Exams*
- ◆ *§341 Meetings*
- ◆ *Depositions*
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Telephone: (813) 920-1466
Facsimile: (813) 920-0800
Email address: kgjts@aol.com

7702 Cypress Lake Drive
Odessa, Florida 33556

The Cramdown
P.O. Box 1438
Tampa, FL 33601-1438